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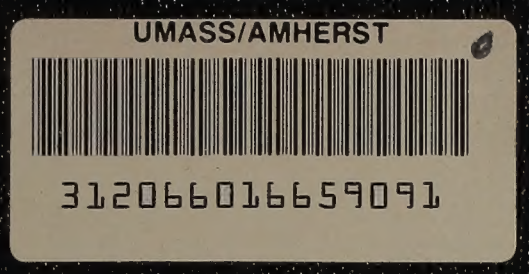

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION
COMMUNITY ANTENNA TELEVISION COMMISSION
LEVERETT SALTONSTALL BUILDING
100 CAMBRIDGE STREET, BOSTON 02202

ROSALIND A. NILES
Commissioner

(617) 727-6925

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CABLE BULLETIN 87-1

Commission Clarification of Certain Transfer Application Issues

November 25, 1987

In the past year, this Commission has witnessed an unprecedented level of transfer activity among cable licensees in this state. The Commission currently has approximately 50 transfer applications outstanding or recently approved. Two major acquisitions are pending in the state, (Cablevision Systems Corporation's acquisition of Adams Russell Cable Company and Continental Cablevision, Inc.'s acquisition of American Cablesystems Corporation), as well as a number of more modest, but also significant system sales and changes in control.

To a large extent, this buying and trading activity is being repeated across the country. Wherever it occurs, it raises novel and often serious questions about the performance of cable operators and the role of local regulators in reviewing that performance. In Massachusetts, a state statute governs transfer of cable licenses and control thereof, delegating authority for approval to the issuing authority. M.G.L.ch.166A, §7. The State Commission has developed regulations and forms implementing this statute, as well as a limited body of precedent interpreting the law. See 207 CMR 4.00 et seq.

This Commission recognizes that the transfer regulations and the form currently in place (Form 100) were developed more than ten years ago when the cable industry's financing and business organization models were quite different from those dominant today. The Commission considers this an appropriate time to revisit those forms and regulations in light of current market realities. However, any review of transfer forms and regulations will involve a serious and intensive study of some complex issues. While we consider action in this area a priority, we are unwilling to act precipitously in matters of such importance.

In the meantime, the Commission has been called upon to clarify a number of its existing transfer regulations and policies. To insure that all parties have the same information and to assist in smoothing the transfer process, the Commission has here compiled a list of answers to questions frequently asked about filling out the Form 100 and complying with Section 4.00 of the Commission's rules.

1. Transfer applicants must answer all questions on the Form 100 with current information.

The Form 100 is the form used for transfer as well as initial and renewal applications. While the Commission will consider whether a separate application would better address the issues present at transfer, for the moment, the Form 100 must be completed in its entirety. The applicant in a transfer situation is the transferee. The applicant must respond with its own information to the Form 100. It may not copy in toto a Form 100 previously filed by the existing licensee.

Because the Commission has been quite clear that the transfer process is not the appropriate time for any amendments to the license, the transfer applicant should keep in mind while responding to the Form 100 that it will become responsible for all license obligations in the event of transfer approval. However, a number of sections of the Form 100 either are frequently unaddressed in local licenses (e.g. privacy policies, consumer complaint procedures, EEO practices) or are no longer subject to regulation (e.g. rates and channel line-up). It is appropriate and instructive for the applicant to include its own anticipated policies in these areas. Municipalities should be able to learn as much as possible about the actual system operation which will take place in their communities.

2. In keeping with the intent of the regulations and the Form 100, the transfer applicant should provide the fullest ownership information possible.

The single most important aspect of transfer of ownership or control is full disclosure of the identity, qualifications and condition of the transferee. Keeping in mind that full disclosure of ownership interests is key in the transfer process, the applicant should interpret liberally those portions of the Form 100 which elicit ownership information. In concrete terms, this means that questions on the Form 100 (in Sections VI, VII or Attachment 2) which are directed towards corporate ownership structures should not be ignored where the entity at issue happens to be a partnership. Rather, to the maximum extent practicable, responses should be crafted to provide analogous information appropriate to the partnership form. The ultimate goal is to provide a complete picture for the issuing authority of exactly what the ownership tree looks like. A common sense approach with this goal in mind should guide the applicant.

3. Any additions or amendments to a Form 100 made prior to the public hearing should be filed promptly with the issuing authority and may affect the period of time within which the issuing authority must act.

Question 35c of the Form 100 includes an important requirement that key agreements and documents executed after the deadline for filing applications must be filed with the issuing authority and the Commission within 7 days of execution. The types of documents covered by this requirement are listed in Question 35b and include, but are not limited to: stockholder agreements, restrictions on transfer of ownership interests and any provisions for re-acquisition of any ownership interest by the applicant or its affiliates. Clearly, partnership agreements are included in this category.

Additional documents similar to those referenced in Question 35b may be variously characterized as supplements, additions or amendments. These distinctions do not have the same significance in a transfer proceeding as in an initial licensing process, where material changes are simply not allowed.

207 CMR 3.04(1)(a). However, several communities have expressed concern that, even if a supplement or amendment to the Form 100 is late-filed, they are bound by Commission precedent to schedule a hearing on the transfer no later than 60 days from the filing of the Form 100. [Teleprompter v. Board of Selectmen of Auburn, CATV Docket No. A-37 (May 17, 1983)]

In the Auburn case, a hearing on the transfer application had been requested and the Board indicated it would not schedule a public hearing for a few months. The Commission was called upon to interpret the meaning of the requirement in its transfer regulations that a public hearing must be held within a reasonable time after the filing of the Form 100. 207 CMR 4.05. In fashioning a remedy for the cable operator, the Commission referred to Section 14 of the statute, M.G.L. ch. 166A, §14, which provides a right to Commission appeal in the case of a licensee aggrieved by an issuing authority's failure to act on the transfer or assignment of control within a period of sixty days. The Commission reasoned:

> The Commission's transfer regulations require the holding of a hearing within a reasonable time, and the statute states that inaction for sixty days constitutes the basis for an appeal. These two provisions, when read together, require that an issuing authority schedule and hold a public hearing on a transfer application no later than sixty days after the application is filed. Auburn, at para. 16.

In Auburn, a Form 100 had been filed, a prompt hearing had been requested and the Board of Selectmen exhibited an unwillingness to act on the application. Under the rationale set out in that case, a right of appeal to the Commission for the Town's "failure to act" was available sixty days after the filing of the Form 100. The Board's inaction in scheduling a hearing was found to be unreasonable, and, as the Commission stated in its opinion, "indefensible."

The Commission has found, however, that the requirement in the regulations that a hearing be held within a reasonable time after filing of the application may not always mean within 60 days of filing. Situations exist in which the "bright line" rule of the Auburn case is not helpful. These situations may involve the supplementation of the application with additional material, as contemplated by Question 35b, or they may involve amendment or completion of the transfer application through provision of previously unavailable information.

Recently, the Commission considered a situation in this category in which a transfer Form 100 was incompletely filed. In this particular situation, a cable operator filed its transfer Form 100 in late August, but because the financing was not finalized at the time of filing, did not include Schedules F and G (debt and equity schedules) with the Form 100. Rather, the operator supplied the promised financial schedules when they became available in mid-October. The City considered the information in these schedules to be significant, and wanted additional time to review the filings prior to scheduling a public hearing. The Commission wrote to the City that in these circumstances, the City should be given a reasonable amount of time to review the additional material, but that both parties should continue to act in good faith to proceed expeditiously with the transfer process. The Commission further recognized that this additional time for review might result in the scheduling of a hearing more than 60 days from the filing of the original Form 100. In such a case, the Commission urged the parties to settle

on an acceptable date which is sensitive to the needs of both sides. However, should the cable operator, in reliance on the reasoning in Auburn, file an appeal with the Commission alleging a 'failure to act' under §14, the Commission would consider, after a full review of the record, whether the City had "failed to act" to hold a public hearing within a reasonable period of time after the filing of the Form 100. The Commission stated, "Relevant considerations would include the materiality of the information omitted in the initial Form 100, the amount of time taken by the City to review any supplemental [omitted] information filed, and 'action' taken on the application by the City during the 60 day period as required by §14." *

4. Form 100 Schedules A - G (Pro forma) Questions

a. Schedules A - E must include accurate and current figures taken from the most recent annual accounting.

In order for the transfer Form 100 to be useful to the community, the financial projections indicating expected performance must be founded in actual experience. Figures copied from an old Form 100 are of little use to a community because they do not reflect the changes in financial performance that occurred when the plan was actually implemented. These updated figures are useful to a community not only in assessing the assumptions and plans of the transferee, but also in updating information about the existing operation. Nor do we think the requirement to provide up-to-date projections is a heavy burden for the operator. Most of the tabulations in these schedules have been already prepared in the same or similar form for internal use.

b. The figures in Schedules A - E may be calculated and presented on a regional basis if the municipality is part of a regional system, although individual figures should be made available to the community on request.

Many municipal cable systems are part of clusters of municipal systems owned by the same operator. Typically, these clusters will be transferred together when a company changes hands. Usually these clusters are operated on a regional or integrated basis and the books for the regional system are maintained on a regional basis, without local breakdowns. Commonly-accepted business principles dictate this bookkeeping practice, and the Commission accepts financial reports from operators (Forms 200, 300 and 400) filed on this basis. In permitting these regional filings, the Commission has recognized that maintenance of separate books for each locality may impose an artificial burden on operators which may be passed on to subscribers. Similarly, if operators transferring a cluster of systems were required to prepare precise local figures solely for transfer application purposes, significant costs might be incurred.

This situation differs from the situation at the time of initial application. At that time, a baseline of actual figures does not exist, and it is as easy for the operator to present individual figures for each community as it is to provide regional projections. In fact, the Commission has stated on several occasions that local information should be made available to communities at the time of initial licensing.

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* The Commission notes that the letters of October 19, 1987 to Mr. Peter Epstein and Ms. Donna Garofano each contained an erratum. On page 2, para. 2, line 12, the words "final vote" should read "public hearing," and the word "taken" should read "held."

During the transfer process as well, while technically not required, the transfer applicant should make efforts to cooperate with the municipality if it requests community-specific information. Certain capital or operating expenses, for example, access or local programming expenses, may be unique to a community and may be provided to a community without difficulty. Furthermore, if a community requests individual figures, the company may provide a specific breakdown of figures determined through an allocation based on a pro rata portion of subscribers, miles of plant, or some other acceptable system. Transfer applicants should work to satisfy reasonable requests for community-specific information whenever possible.

c. For Schedules A - E, a transfer applicant is required to project figures only for those years left in the license, although at its option, it may include figures for the entire 10 years. Schedules F and G must be filled out for the entire 10 years.

The figures in Schedules A - E project the actual performance of the cable system. Because the figures are relevant only for the license term, it is not necessary for companies to supply projections for years not included in the license term. Even though, under the Cable Act, there is a strong likelihood of renewal of a license, often the renegotiation of license terms which occurs at renewal significantly affects the projections in Schedules A - E. Furthermore, if a license has three or fewer years in its term, it is expected that a renewal Form 100 which includes the projections with pertinent adjustments, will be prepared and submitted to the municipality. This renewal application will provide meaningful financial information which takes account of the proposed changes to the system. Conversely, figures projected beyond the term of the license will not accurately reflect the new terms occurring at renewal time. *

Most pro forma projections in renewal or transfer cases are done by computer according to a formula which frequently involves set increases or adjustments for each year of the license. Thus, supplying projections for a full ten years in the transfer application often presents little problem for the proposed cable operator. Therefore, if an applicant wishes to submit Schedule A - E figures for the full ten years, as most transfer applicants have, it is free to do so. Municipalities should recognize, however, the limited value of the figures in the later years.

Schedules F and G set out a debt financing plan and equity/flow of funds schedule respectively. Unlike Schedules A - E, these two schedules provide a picture of the proposed financing for the acquisition and operation of the system which is complete in itself. The information provided in these forms is relevant for purposes greater than the financial performance of the system for the years remaining on the license. These schedules are prepared without the boundaries of the license term in mind. Municipalities may learn a great deal of relevant information about the fundamental constraints and expectations of the operator from these schedules. Accordingly, the fullest information possible should be provided.

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* It is possible, of course, that situations will exist where completion of pro formas for the full ten years is appropriate, even though the current license is due to expire shortly. These may include situations in which the licensee has already signed a renewal agreement, so the projections are already in place, or situations where, for a number of reasons, the municipality and the licensee have agreed that there will be no significant changes at the time of renewal. We expect municipalities and operators to work out an understanding in these situations by themselves.

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In addition to the answers to specific questions about the forms which are addressed above, the Commission would like to reiterate some general guidance regarding the transfer process.

In recent years, the Commission has decided only one case in which a transfer of license was denied by a municipality. In Bay Shore Cable TV Associates v. Board of Selectmen of the Town of Weymouth, CATV Docket No. A-55 (Nov. 15, 1985), the Board of Selectmen conditioned transfer approval on an agreement by the transferee to desist from advance billing. The Commission ruled that the Board's action was inappropriate and set out two principles of transfer law. First, the role of the issuing authority is to determine whether the transferee can assume the obligations of the license and continue the level of service provided by the transferor. In other words, the issuing authority must look to see whether the transferee can "step into the shoes" of the transferor. In evaluating this ability, the issuing authority may consider such factors as the transferee's financial qualifications, management and technical expertise, character qualifications, experience in the cable industry and performance in other communities.

Second, the transfer process is not the appropriate time to make changes in the license terms.

> It is not proper for an issuing authority to propose amendments to an existing license or to renegotiate its terms during the transfer process. If an issuing authority wants to renegotiate the terms of its license or to amend it, it may do so in a proceeding held pursuant to a license renewal or amendment. Id. at 4, quoting Commission Advisory, March 9, 1983.

Finally, some confusion has been expressed about the conflict in the provisions of the statute, M.G.L. ch. 166A, §7 and the regulation interpreting the statute, 207 CMR 4.06. The statute governing transfers was amended in 1979 to state, "The consent of an issuing authority to a transfer or assignment of a license for an unconstructed CATV system shall not be given if the consideration being paid in the proposed transaction includes a substantial payment for the license." (emphasis added) On the other hand, the Commission's regulations, which predate this quoted statutory language, state, "Pursuant to [Section 7], the [issuing authority] report shall also contain a finding . . . that the consideration being paid in the transaction does not include a substantial payment for the license issued hereunder." (emphasis added) The Commission has found that the language of the statute and of the regulation are not consistent, and according to rules of statutory construction, the statute takes precedence. It appears that the Legislature intended the finding of no substantial payment for the license to be required only in the transfer of unconstructed systems, and the regulations were not amended to comport with the legislative intent. Accordingly, Section 4.06 of the Commission's regulations is superseded by the statute to the extent the terms are in conflict. The Commission will certainly place this regulatory amendment on its agenda when it revisits the transfer regulations.

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